No. 48867-1-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

JASON A. McCLURE,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF
THE STATE OF WASHINGTON FOR COWLITZ COUNTY

The Honorable Michael J. Sullivan

BRIEF OF APPELLANT

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A. SUMMARY OF ARGUMENT

Jason McClure and Robert Williams entered into a business relationship wherein Mr. McClure rented property from Mr. Williams. The relationship deteriorated and Mr. Williams evicted Mr. McClure from the property. Shortly before the eviction, Mr. Williams went to the property and found damage and items missing. After the eviction, Mr. Williams found people, who had answered a Craigslist advertisement inviting them to take anything on the property taking items. Mr. Williams discovered Mr. McClure had posted the advertisement.

Mr. Williams asked Mr. McClure to withdraw the advertisement. Mr. McClure agreed only if Mr. Williams provided a notarized letter stating he would not press charges against Mr. McClure for anything that occurred on the property. Mr. McClure was charged and convicted of first degree extortion. Mr. McClure seeks reversal of that conviction for a failure of proof.

B. ASSIGNMENT OF ERROR

The State failed to prove Mr. McClure committed first degree extortion.

C. ISSUE PERTAINING TO ASSIGNMENT OF ERROR

Due process requires the State to prove every essential element of the charged offense beyond a reasonable doubt. First degree extortion as charged here requires proof of an attempt to obtain by threat "services" or "property" of another. Here the State argued that Mr. McClure's text message asking Mr. Williams to take a notarized letter stating he would not file charges against Mr. McClure to a location was a "service." Where the suggested act does not qualify as a "service" or "property," is Mr. McClure entitled to reversal of his conviction with instructions to dismiss?

D. STATEMENT OF THE CASE

Jason McClure agreed to rent a piece of property in Kelso owned by Robert Williams. 2/23/2016RP 60. Mr. McClure had done some construction work on another of Mr. Williams' rental homes in the past and had rented another of Mr. Williams' properties. 2/23/2016RP 60, 62. Included on the Kelso property was a three bedroom trailer that had a refrigerator, cabinets, bathtub, carpeting, wood stove, and doors. 2/23/2016RP 37, 63. Mr. Williams did not agree that Mr. McClure could keep the appliances. 2/23/2016RP 63.

The lease agreement called for the first year rent free and rent beginning in the second year and increasing each year after that. 2/23/2016RP 62. As the first year was coming to a close, Mr. Williams became concerned that Mr. McClure would not be able to begin paying rent. 2/23/2016RP 64. Mr. Williams stated he reminded Mr. McClure that would have to begin paying rent on the first of the year or he would evict Mr. McClure. 2/23/2016RP 66. According to Mr. Williams, Mr. McClure told him that if he was evicted, Mr. McClure would cause damage to the property. 2/23/2016RP 66.

Mr. McClure was unable to begin paying rent and Mr. Williams moved to evict him. 2/23/2016RP 67. Mr. Williams went to the property the day before the eviction was to occur and everything was still present at the residence. 2/23/2016RP 70. Mr. Williams stated he went the next day prior to the eviction and claimed that there was substantial damage to the trailer and many items missing. 2/23/2016RP 72-73. Mr. Williams contacted the Cowlitz County Sheriff's Office and reported the damage. 2/23/2016RP 74.

Mr. Williams went back to the property several days later and observed a number of people present, some taking items, one person cutting wire, and another trying to take the siding off the trailer.

2/23/2016RP 75. Mr. Williams again contacted the Sheriff's Office. 2/23/2016RP 75-76. When the sheriff's deputies arrived, one of the deputies showed Mr. Williams an advertisement on Craigslist, inviting people to come to the property and take what they wanted. 2/23/2016RP 76. Mr. Williams claimed he immediately texted Mr. McClure and told Mr. McClure to take down the Craigslist advertisement. 2/23/2016RP 77. According to Mr. Williams, Mr. McClure told him he would take the ad down when Mr. Williams provided a notarized statement agreeing not to hold Mr. McClure or his wife responsible or press any charges for anything related to the property. 2/23/2016RP 77, 80.

Mr. McClure was subsequently charged with one count of first degree extortion[1] CP 7.

> The defendant, in the County of Cowlitz, State of Washington, on, about, or between 2/27/2015 and 2/28/2015, by means of a wrongful threat, to-wit: threatened to keep up an online ad inviting people to take physical property from Robert S. Williams, the owner thereof; knowingly attempted to obtain property or services of the owner of that property, Robert S. Williams, contrary to RCW 9A.56.120(1) and RCW 9A.04.110(28)(B) and against the peace and dignity of the State of Washington.

CP 7.

During his rebuttal argument, the prosecutor clearly stated his theory of the case:

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[1] Mr. McClure was also charged and convicted of first degree malicious mischief. CP 7, 25.

> It's about a service, and that service that Mr. McClure wanted was a release from legal liability for doing exactly what he had already told Williams he was going to do, which his [sic] rip the doors off the mobile home.

RP 228.

Following a jury trial, Mr. McClure was convicted as charged. CP 25-26.

E. ARGUMENT

1. There was insufficient evidence presented to prove Mr. McClure committed extortion as there was no evidence he obtained or attempted to obtain property or services from Mr. Williams.

a. *The State bears the burden of proving each of the essential elements of the charged offense beyond a reasonable doubt.*

The State is required to prove each element of the crime charged beyond a reasonable doubt. U.S. Const. amend XIV; *Apprendi v. New Jersey,* 530 U.S. 466, 471, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000); *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). The standard the reviewing court uses in analyzing a claim of insufficiency of the evidence is "[w]hether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct.

2781, 61 L.Ed.2d 560 (1979). A challenge to the sufficiency of evidence admits the truth of the State's evidence and all reasonable inferences that can be drawn therefrom. *State v. Salinas,* 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

b. *Mr. McClure's demand for a notarized letter was not a "service" as that term is defined.*

One is guilty of extortion in the first degree "if he or she commits extortion by means of a threat." RCW 9A.56.120.[2] In its modern form, statutory extortion, "is, of course, closely related to the crime of robbery, having in fact been created in order to plug a loophole in the robbery law by covering sundry threats which will not do for robbery." *State v. Strong*, 167 Wn.App. 206, 214, 272 P.3d 281 (2012); *quoting* 3 Wayne R. LaFave, Substantive Criminal Law § 20.4(a), 198 & n. 3 (2d ed. 2003).

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[2] Threat is defined for the purposes of RCW 9A.56.120 as

> (28) "Threat" means to communicate, directly or indirectly the intent:
> (a) To cause bodily injury in the future to the person threatened or to any other person; or
> (b) To cause physical damage to the property of a person other than the actor; or
> (c) To subject the person threatened or any other person to physical confinement or restraint; or

RCW 9A.04.110.

Mr. McClure was convicted of first degree extortion, defined as knowingly obtaining or attempting to obtain "by threat property or *services* of the owner, and specifically includes sexual favors." RCW 9A.56.110 (emphasis added). Services are defined as:

> "Services" includes, but is not limited to, labor, professional services, transportation services, electronic computer services, the supplying of hotel accommodations, restaurant services, entertainment, the supplying of equipment for use, and the supplying of commodities of a public utility nature such as gas, electricity, steam, and water;

RCW 9A.56.010(15).

Instructive on this issue is the decision in *State v. Stockton*, 97 Wn.2d 528, 647 P.2d 21 (1982). This decision involved two letters from the defendant to the victim, one suggesting the victim could prevent her murder if she accompanied the defendant to his psychiatrist; the second suggesting various ways in which the victim and her husband could be killed unless she allocated "her sexual favors between the defendant and her husband." *Id.* at 529. The issue before the Supreme Court was whether either of the demands in the letters constituted a "service" within the meaning in RCW 9A.56.010 for the purposes of first degree extortion convictions. *Id.* at 530. RCW

9A.56.010, defining services, is essentially unchanged from the statute in effect at the time of the decision in *Stockton.* 97 Wn.2d at 530.

The Court determined that:

> The kinds of services listed in the statute are those for which compensation is usually received. The phrase "includes, but is not limited to" (RCW 9A.56.010(10)) thus contemplates only those kinds of services and not the sexual favors which defendant was asking to be freely given to him.

Stockton, 97 Wn.2d at 532-33.[3] The Court ultimately concluded the defendant's actions constituted coercion, with which he was not charged, as opposed to extortion and reversed his convictions. *Id.* at 533 ("The language of RCW 9A.36.070 [coercion] covers the conduct of defendant. Only by straining and twisting the language can RCW 9A.56.120 [first degree extortion] be said to cover the actions of the defendant").

The same is true in Mr. McClure's case. It is important to remember the threat Mr. McClure made: he was not demanding property from Mr. Williams, but as the prosecutor argued, he was seeking the notarized letter, alleged to be a "service." Thus, what Mr. McClure was asking Mr. Williams to do was not something for which

[3] The extortion statute has been amended to specifically include sexual favors. RCW 9A.56.110.

one would normally be compensated. *See Stockton*, 97 Wn.2d at 533-33 (concluding the terms listed as "services" in former RCW 9A.56.010(10) [now RCW 9A.56.010(15)] are those for which compensation is usually received."). Asking someone to provide a notarized letter is not something for which one expects the person to be compensated.

More importantly, as in *Stockton*, Mr. McClure's actions were much more consistent with coercion as opposed to extortion. Coercion requires a threat that "compels or induces a person to engage in conduct which the latter has a legal right to abstain from, or to abstain from conduct which he or she has a legal right to engage in." RCW 9A.36.070.[4] Like in *Stockton*, Mr. McClure was attempting to coerce

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[4] The *Stockton Court* also looked to the Model Penal Code statutes for coercion and extortion and noted that:

> There is considerable overlap between the threatened conduct covered by the two sections (criminal coercion, s 212.5, and extortion, s 223.4); the major difference lies in the purpose and effect of the coercive and extortionate threats. Criminal coercion punishes threats made "with purpose unlawfully to restrict another's freedom of action to his detriment," while extortion is included within the consolidated offense of theft because it is restricted to one who "obtains property of another by" threats.

Stockton, 97 Wn2d at 531 (footnote omitted.), *citing* 2 ALI Model Penal Code and Commentaries s 223.4, comment 1 at 203 (Official Draft and Revised Comments, 1980).

(compel or induce) Mr. Williams into providing the letter, as opposed to seeking to take anything of value from Mr. Williams. But, Mr. McClure was not charged with coercion. The facts simply do not support the extortion conviction. *Stockton*, 97 Wn.2d at 523-33.

c. *Mr. McClure's demand for a notarized letter was not to obtain or attempt to obtain "property" as that term is defined.*

"Property, for purposes of the extortion statute means 'anything of value, whether tangible or intangible, real or personal.'" *State v. Taylor*, 30 Wn.App. 89, 96, 632 P.2d 892, *review denied*, 96 Wn.2d 1012(1981), *quoting* RCW 9A.04.110(22). Since extortion is related to robbery, *Strong*, 167 Wn.App. at 214, Mr. McClure had to have threatened to take a tangible "thing" from Mr. Williams.

Again it is important to remember what Mr. McClure's threat was: Mr. McClure would only withdraw the Craigslist advertisement in return for a notarized letter promising not to press charges against him for whatever happened on the property. Thus, he was seeking a notarized letter. Such a letter has no intrinsic value, thus it cannot be property.

Since the State failed to prove Mr. McClure threatened to take services or property from Mr. Williams, he is entitled to reversal of the extortion conviction.

d. *Mr. McClure's conviction for extortion must be reversed with instructions to dismiss.*

Since there was insufficient evidence to support the extortion conviction, this Court must reverse the convictions with instructions to dismiss. To do otherwise would violate double jeopardy. *State v. Crediford*, 130 Wn.2d 747, 760-61, 927 P.2d 1129 (1996) (the Double Jeopardy Clause of the United States Constitution "forbids a second trial for the purpose of affording the prosecution another opportunity to supply evidence which it failed to muster in the first proceeding."), *quoting Burks v. United States,* 437 U.S. 1, 9, 98 S.Ct. 2141, 57 L.Ed.2d 1 (1978).

2. The Court should exercise its discretion and deny any request for costs on appeal.

Should this Court reject Mr. McClure's argument on appeal, he asks this Court to issue a ruling denying any request for costs on appeal due to his continued indigency. Such a request is authorized under the recent decision in *State v. Sinclair*, 192 Wn.App. 380, 389-90, 367 P.3d 612, *review denied*, __ Wn.2d __ (2016).

The appellate courts may require a defendant to pay the costs of the appeal. RCW 10.73.160. While appellate court commissioners have no discretion in awarding costs where the State substantially prevails, the appellate courts may "direct otherwise." RAP 14.2; *Sinclair*, 192 Wn.App. at 385-86, *quoting State v. Nolan*, 141 Wn.2d 620, 626, 8 P.3d 300 (2000). This discretion is not limited to "compelling circumstances." *Sinclair,* 192 Wn.App. at 388, *quoting Nolan*, 141 Wn.2d at 628.

In addition, a defendant found to be indigent is presumed to remain indigent "throughout the review" unless there is a finding that the defendant is no longer indigent. RAP 15.2(f). Mr. McClure had previously been found indigent prior to trial, and there has been no showing that Mr. McClure's circumstances have so changed that he is no longer indigent. In fact, the opposite is true; he has been incarcerated since his arrest.

In *Sinclair*, the Court ruled it has an obligation to deny or approve a request for costs, and a request for the Court to consider the issue of appellate costs can be made when the issue is raised preemptively in the Brief of Appellant. 192 Wn.App. at 390-91. This Court must then engage in an "individualized inquiry" regarding the

defendant's ability to pay. *Id.* at 391, *citing State v. Blazina*, 182 Wn.2d 827, 838, 344 P.3d 680 (2015).

Because of his current and presumed continuing indigency, Mr. McClure asks this Court to order that costs be ordered on appeal. *Sinclair*, 192 Wn.App. at 393.

F. CONCLUSION

For the reasons stated, Mr. McClure asks this Court to reverse his conviction for extortion with instructions to dismiss. Alternatively, Mr. McClure asks this Court to exercise its discretion and order that costs not be awarded on appeal.

DATED this 5th day of October 2016.

Respectfully submitted,

s/Thomas M. Kummerow

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	)	
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	)	
APPELLANT.	)	

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